IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 24064-9-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
PERRY T. ASHELMAN,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

SWEENEY, C.J.—A motion to withdraw a guilty plea is not a critical stage of the prosecution for which the constitution guarantees the right to counsel. The trial court committed no constitutional violation and did not abuse its discretion by refusing to allow Mr. Ashelman to withdraw his plea without benefit of counsel. We affirm the denial of his motion to withdraw his plea.

FACTS

Perry Ashelman pleaded guilty on March 18, 2004 to one count of possessing stolen property. A year later, on March 24, 2005, the same judge conducted a hearing on Mr. Ashelman's motion to withdraw the plea.

Mr. Ashelman's lawyer was present in court because Mr. Ashelman had other

matters pending that day. Counsel informed the court he was not representing Mr. Ashelman at the hearing. Mr. Ashelman addressed the court himself. He said he had been on Thorazine, a psychotropic medication, when he entered his guilty plea and did not know what was happening. He argued, then, that his plea was not knowing and voluntary.

The court denied the motion. The judge remembered the plea hearing and recollected having no concerns about Mr. Ashelman's ability to understand the proceedings and assist counsel. His responses had been appropriate.

DISCUSSION

Mr. Ashelman appeals this ruling and complains that he was denied assistance of counsel at the motion hearing. He contends a motion to withdraw a guilty plea is a critical stage of the prosecution for which he had a constitutional right to counsel and that his lawyer presented neither evidence nor argument. Therefore, he effectively represented himself. He contends the court erred by permitting this without making a record of his unequivocal, knowing waiver of his right to counsel.

The State responds that there is no right to counsel for any post-conviction proceeding except the first direct appeal.

We review an ineffective assistance claim de novo. *State v. Shaver*, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). A claim of ineffective assistance of counsel presupposes a

right to counsel in the first place. Here, Mr. Ashelman had no right to counsel.

The right to counsel is constitutionally guaranteed at all critical stages of a criminal prosecution. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22; CrR 3.1(b)(2); *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). It is well established, however, that there is no constitutional right to counsel in a post-conviction proceeding other than the first direct appeal as of right. *State v. Winston*, 105 Wn. App. 318, 321, 19 P.3d 495 (2001); *State v. Forest*, 125 Wn. App. 702, 708, 105 P.3d 1045 (2005).

Mr. Ashelman relies on *State v. Harell*, 80 Wn. App. 802, 911 P.2d 1034 (1996). There, the defendant moved to withdraw his plea before judgment and sentence were entered. He was entitled to appointed counsel. *Id.* at 803-04. Mr. Harell's prejudgment right to the right to counsel was comparable to that on direct appeal. *Winston*, 105 Wn. App. at 321 (explaining *Harell*). But the constitutional right to counsel expires with the period for the first appeal as of right. *Id.*

Mr. Ashelman claims no statutory or rule-based right to counsel for his motion to withdraw his plea. And none exists. CrR 4.2(f). As with this court's personal restraint petition procedure, the superior court judge may appoint counsel if the judge finds merit in the petition after a preliminary screening. *Robinson*, 153 Wn.2d at 695 (citing CrR 7.8(c)(2) and RAP 16.15(h)).

Counsel was neither required nor indicated here. We find no error.

We turn next to the merits of the

motion to withdraw the plea. Mr. Ashelman contends he was not competent to enter a plea.

He points to the judge's remark at the withdrawal hearing that he appeared more lucid at the original plea hearing than he did then. He contends this was because his statements at the original plea hearing were limited to monosyllabic "yes" or "no" responses. At the motion to withdraw, by contrast, he was speaking for himself and his difficulties were more apparent.

The State takes issue with Mr. Ashelman's characterization of the record. It contends the yes and no answers were responsive and appropriate, and some answers were longer. Moreover, the State questions whether Mr. Ashelman was impaired by Thorazine. The record contains neither documentary evidence nor argument in support of his drug use, and the State argues it would be easy enough to substantiate the use from prison and hospital records.

The court may permit a defendant to withdraw a guilty plea to correct a manifest injustice. CrR 4.2(f); *State v. Marshall*, 144 Wn.2d 266, 280-81, 27 P.3d 192 (2001). "Manifest" means evident from the record. *State v. Trout*, 125 Wn. App. 313, 317-18, 103 P.3d 1278 (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)), *review denied*, 155 Wn.2d 1004 (2005).

It is a manifest injustice to accept a guilty plea that is not voluntary. *State v. Wakefield*, 130 Wn.2d 464, 472, 925 P.2d

183 (1996). A plea is not voluntary if the defendant is not competent to enter it. *State v. Osborne*, 102 Wn.2d 87, 98, 684 P.2d 683 (1984).

We review the denial of a motion to withdraw a plea for abuse of discretion. *Marshall*, 144 Wn.2d at 280. The trial court has broad discretion to assess mental capacity to enter a plea. *Osborne*, 102 Wn.2d at 98. The plea will stand if the record on its face shows an intelligent and voluntary waiver of constitutional rights. *Wood v. Morris*, 87 Wn.2d 501, 506, 554 P.2d 1032 (1976).

Here, the same judge heard both the plea and motion to withdraw. The court was not, therefore, relying on a transcript. She personally recalled Mr. Ashelman's plea. Moreover, Mr. Ashelman had been represented by counsel when entering his plea, and counsel raised no concerns about competence.

The court had no concerns about his ability to understand the proceedings, to assist his counsel, or to recognize the consequences of his plea. The record supports the judge's recollection of the plea colloquy. One purpose of the colloquy is to enable the judge to evaluate the defendant's competence. *Wood*, 87 Wn.2d at 506. The judge here remembered being satisfied that Mr. Ashelman's plea was knowing and voluntary.

No error is manifest on this record. It is true that many of Mr. Ashelman's responses were variations on "yes" and "no." But those answers were appropriate to the form of the questions. Mr. Ashelman confirmed personal information read to him by the

judge. He acknowledged that he understood his rights, had consulted with counsel, and had received no promises or threats. When asked to state his understanding of the potential sentence, Mr. Ashelman had the mental acuity to respond: "I understand that, if my point range is 5, I'll be offered 14 to 18 months. If it's a 6, 17 to 22 months." Report of Proceedings (RP) (Mar. 18, 2004) at 9.

The court did not abuse its discretion in adhering to its prior determination that Mr. Ashelman was competent to enter a plea.

ADDITIONAL GROUNDS FOR REVIEW

Mr. Ashelman raises some issues concerning his guilt that we will not review. He waived these by pleading guilty. CrR 4.2; *State v. Gaut*, 111 Wn. App. 875, 880, 46 P.3d 832 (2002).

We affirm the ruling of the court.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: Sweeney, C.J.

Schultheis, J.

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Kato, J.